[redacted]

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1988

[redacted]
[redacted] Secretary of State,
[redacted]
Michigan Attorney General,

Appellants,

v.

MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR APPELLANTS

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QUESTION PRESENTED

Whether a non-profit corporation formed to promote the interests of the business community, which draws 75 percent of its funds from business corporations, may constitutionally be barred from expending such funds in political campaigns advocating the nomination, election, or defeat of a designated candidate or candidates for public office.

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OPINIONS AND ORDERS OF THE COURTS BELOW

The December 14, 1988 order and the December 27, 1988 amended order of the United States Court of Appeals for the Sixth Circuit denying petition for rehearing en banc are published at 865 F.2d 716 (6th Cir. 1988) and appear in the Appendix to the Jurisdictional Statement at J.S. App. 30a-38a.[1] The September 15, 1988 opinion of the United States Court of Appeals for the Sixth Circuit is published at 856 F.2d 783 (6th Cir. 1988) and appears at J.S. App. 1a-29a. The September 3, 1986 opinion of the United States District Court for the Western District of Michigan is published at 643 F. Supp. 397 (W.D. Mich. 1986) and appears at J.S. App. 39a-77a.

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1 "J.S. App." references are to the Jurisdictional Statement Appendix filed by the Appellants. "J.A." references are to the Joint Appendix.

JURISDICTION

The judgment of the United States Court of Appeals was entered on September 15, 1988. It held Mich. Comp. Laws Ann. ("MCL") § 169.254(1) (West 1988 Supp.), a provision of the Michigan Campaign Finance Act ("Campaign Act"), 1976 Mich. Pub. Acts 388, Mich. Comp. Laws Ann. §§ 169.201 et seq. (West 1988 Supp.) which requires that corporations finance candidate political contributions and expenditures through separate segregated funds, unconstitutional as applied to the Michigan State Chamber of Commerce. The Michigan State Chamber of Commerce is "a nonprofit Michigan corporation ... comprised of about eight thousand voluntary members, approximately seventy-five percent of whom are

corporations." (J.S. App. 3a). A petition for rehearing en banc was denied on December 14, 1988. (J.S. App. 30a-31a). The Appellants filed a timely Notice of Appeal in the United States Court of Appeals for the Sixth Circuit on March 3, 1989. (J.S. App. 79a). On March 10, 1989, the Appellants filed their Jurisdictional Statement, and on May 1, 1989, the Court noted probable jurisdiction. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the

people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the Constitution of the United States provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statute at issue, Mich. Comp. Laws Ann. § 169.254(1) (West 1988 Supp.), in pertinent part, states:

> Except with respect to the exceptions and conditions in subsections (2) and (3) and section 55, and to loans made in the ordinary course of business, a corporation may not make a contribution or expenditure ....

The other relevant provisions of the Campaign Act are reprinted at J.S. App. 83a-109a.

STATEMENT OF THE CASE

A. Background

For over seventy-five years, the Michigan legislature has recognized that election activity in candidate elections by business organizations in the corporate form poses special problems of corruption and the appearance of corruption. In 1913, six years after Congress passed the Tillman Act[2], Michigan enacted the Corrupt Practices Act[3] which banned

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2 Act of 1907, ch. 420, 34 Stat. 864 (1907).

3 1913 Mich. Pub. Acts 109.

the use of corporate treasury funds for the payment of election expenses. This statutory ban withstood a constitutional attack in People v. Gansley, 191 Mich. 357; 158 N.W. 195 (1916). See also Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10), 396 Mich. 465, 490-493; 242 N.W.2d 3 (1976). Consistent with this history and its expert judgment that a general prohibition on contributions and expenditures by business corporations in candidate elections is necessary to achieve compelling public interests, the Michigan legislature for decades has protected the integrity of the electoral process by enacting, re-enacting and refining laws[4]

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4 See 1925 Mich. Pub. Acts 351, Pt. 5, Ch. II, § 14; 1954 Mich. Pub. Acts 116, § 919; and 1975 Mich. Pub. Acts 227, § 95.

barring corporations from utilizing treasury funds to finance contributions, expenditures or independent expenditures in connection with candidate elections. At issue in this appeal is the ban on independent expenditures from treasury funds by a non-profit corporation, the Michigan State Chamber of Commerce, formed to promote the interests of the business community, which accepts corporate monies in the form of dues from its thousands of corporate members. The independent expenditures ban prevents the Michigan State Chamber of Commerce from serving as a conduit for corporate treasury money into Michigan candidate elections.[5]

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5 Corporations are not prohibited from making expenditures or contributions in ballot question elections. See, Michigan State Chamber of Commerce v. Austin, 832 F.2d 947 (6th Cir. 1987).

The statute at issue, MCL § 169.254(1), prohibits "a corporation" from utilizing treasury funds to finance independent expenditures in connection with a state candidate election. An independent expenditure is defined as an expenditure[6] which "is not made at the direction of, or under the control of, another person and if the expenditure is not a contribution to a committee." MCL § 169.209(1). The Campaign Act permits, however, the use of such treasury funds

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6 "Expenditure" is defined by § 6 of the Campaign Act as "a payment, donation, loan, pledge, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question." MCL § 169.206(1).

for "the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes." MCL § 169.255(1).

Business corporations are restricted to soliciting contributions to those separate segregated funds (political action committees) from stockholders, officers and directors, and executive and administrative personnel of the corporation. MCL § 169.255(2). Non-profit corporations, like the State Chamber, are restricted to soliciting contributions for political action committees from individual members and their spouses, stockholders, officers and directors, and executive and administrative personnel of the non-profit corporation. MCL § 169.255(3).

A separate segregated fund must register with the Michigan Department of State as an "independent committee"[7] or a "political committee"[8] and is subject to registration and reporting requirements.[9] Similarly, any "person"[10] who receives

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7 "Independent committee" is defined by § 8(2) of the Campaign Act. MCL § 169.208(2).

8 "Political committee" is defined by § 11(2) of the Campaign Act. MCL § 169.211(2).

9 The registration and reporting requirements are contained in §§ 24-26, 28, 31-33, 32, 33, 35-38 of the Campaign Act. MCL §§ 169.224, 169.225, 169.226, 169.228, 169.231, 169.232, 169.233, 169.235, 169.236, 169.237, and 169.238.

10 "Person" is defined by § 11(1) of the Campaign Act as a "business, individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, labor organization, company, corporation, association, committee, or any other organization or group of persons acting jointly." MCL § 169.211(1).

contributions or makes expenditures in connection with a state candidate election in the amount of $200.00 or more in a calendar year, is a "committee"[11] for purposes of the Campaign Act and is subject to registration and reporting requirements.

The Michigan State Chamber of Commerce ("State Chamber") is a non-profit, multi-purpose, membership corporation formed in 1959 under Michigan law to promote the common good and the interests of the Michigan business community. (J.S. App. 3a; J.A. 3a, 42a, 121a-122a, 142a, 147a). The State Chamber's objectives include "promot[ing]

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11 "Committee" is defined by § 3(4) of the Campaign Act. MCL § 169.203(4).

conditions favorable to the economic development of the State of Michigan," "analyz[ing], compil[ing] and disseminat[ing] information on laws and regulations of interest to the members," "collect[ing] data and mak[ing] investigations and surveys relative to matters of social, civic, and economic importance to the State of Michigan," and receiving expenditures and making political contributions. (J.A. 43a-44a). More than 75 percent of the 8,000 members of the State Chamber are profit-making business corporations, such as General Motors, Ford, and Chrysler. (J.S. App. 3a, 33a; J.A. 134a). All State Chamber members, corporate and non-corporate, are assessed and pay annual dues to the State Chamber. (J.S. App. 3a; J.A. 45a-46a).

On June 10, 1985, a special election was scheduled to be held to fill a vacancy caused by the resignation of the incumbent in the 93rd Legislative District for the Michigan House of Representatives. (J.S. App. 4a, 42a-43a). Through a paid advertisement in the June 9, 1985 Grand Rapids Press, the State Chamber sought to make an independent expenditure out of its treasury funds in support of Richard Bandstra, a candidate in the special election.[12]

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12 The State Chamber, if it had desired, could have paid for the advertisement in question through its separate segregated fund, the State Chamber Political Action Committee, which was established in 1977. (J.A. 143a). Indeed, that Committee, the largest and most successful state chamber political action committee in the United States, had a projected balance of over $140,000.00 to spend in the 1986 elections. (J.A. 143a, 161a-162a).

(J.S. App. 4a; J.A. 17a). Because a violation of the ban on independent expenditures in candidate elections by a corporation constitutes a felony, punishable by a fine of $10,000.00, the State Chamber was precluded from making the independent expenditure at issue.[13] The State Chamber, therefore, on May 24, 1985 filed an action in the United States District Court for the Western District of Michigan for declaratory and injunctive relief against Appellants Richard H.

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13 MCL § 169.254(5) imposes criminal penalties upon violators of § 54(1) of the Campaign Act:

> A person who knowingly violates this section is guilty of a felony and shall be punished by a fine of not more than $5,000.00 or imprisoned for not more than 3 years, or both, and if the person is other than an individual, the person shall be fined not more than $10,000.00.

Austin, Secretary of State, and Frank J. Kelley, Attorney General, challenging the constitutionality of MCL 169.54(1) which prohibits corporate independent expenditures in candidate elections. (J.A. 154a-155a).

B. The Decisions of the Courts Below

Following the completion of discovery, a four-day non-jury trial was conducted before the Honorable Douglas W. Hillman, Chief Judge, on May 9 and 12, 1986, and June 12 and 13, 1986. (J.S. App. 43a). Seven witnesses testified and numerous exhibits were introduced into evidence. (J.S. App. 43a-44a). Judge Hillman issued his opinion on September 3, 1986 concluding that the ban on corporate independent expenditures in candidate elections as applied to the

State Chamber was not violative of the First Amendment because the ban "serve[d] the state's compelling interest in preventing corruption or the appearance of corruption in the electoral process." (Footnote omitted.) (J.S. App. 59a). The Court further found that § 54(1) was valid under the Equal Protection Clause of the Fourteenth Amendment. (J.S. App. 72a). Accordingly, on September 3, 1986, the District Court entered a judgment in favor of Appellants and against the State Chamber. (J.S. App. 78a).

On September 16, 1986, the State Chamber filed its Notice of Appeal with the United States Court of Appeals for the Sixth Circuit. (J.A. 34a-35a). On September 15, 1988, the Court of Appeals reversed holding that § 54(1) as applied

to the State Chamber is unconstitutional, "for it infringes upon speech at the core of the first amendment without a compelling justification." (Footnote omitted.)[14] (J.S. App. 28a). In its holding, the Court of Appeals concluded that the instant case was controlled by this Court's holding in Federal Election Commission v. Massachusetts Citizens for Life, Inc., ("MCFL"), 479 U.S. 238 (1986), involving a parallel federal statutory provision requiring that cor-

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14 In view of its holding, the Court of Appeals did not consider the State Chamber's assertions that MCL § 169.254(1) is not "precisely drawn," or that it violates the Equal Protection Clause. (J.S. App. 28a-29a). It is clear, however, that the State Chamber's equal protection claim is meritless. Federal Election Commission v. Massachusetts Citizens For Life, Inc., 479 U.S. 238, 258-259 n. 11 (1986).

porate election expenditures be financed through separate segregated funds. (J.S. App. 14a).

On September 28, 1988, Appellants filed a petition for rehearing en banc in the Court of Appeals. On December 14, 1988, an order was entered denying the petition. (J.S. App. 30a). Four judges of the Sixth Circuit on December 27, 1988 dissented from the order denying the petition for rehearing en banc, asserting that the Court of Appeals decision violated this Court's holding in MCFL, supra. (J.S. App. 32a-38a).

SUMMARY OF ARGUMENT

In a long line of cases, this Court has recognized the beneficial economic attributes of the corporate form of

organization and has upheld First Amendment restrictions against corporations in the arena of political activity. The corporate form permits substantial accumulation of economic power and restrictions are, therefore, necessary both to ensure that economic advantage is not automatically translated into political advantage and to ensure that individuals' contributions to the corporation, made for other purposes, are not used for political activity to which the individuals are opposed. The Court's teachings in cases such as Federal Election Commission v. National Right to Work Committee, 459 U.S. 197 (1982), California Medical Association v. Federal Election Commission, 453 U.S. 182 (1981) and United States v. United Auto Workers, 352 U.S. 567 (1957), lead to the

inescapable conclusion that a state or the federal government may permissibly restrict independent political expenditures by traditional commercial business corporations.

In Federal Election Commission v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986), however, this Court created a narrow exception to this general rule, because of the unique attributes of the particular entity. The corporation there was found to be more like a voluntary political association than a business firm and, consequently, did not pose the threat that "resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." 479 U.S. at 257.

In the instant case, Appellants State officials contend that the Campaign Act permits Appellee State Chamber to engage actively in independent political speech. Even if Michigan's prohibition on corporate independent political expenditures burdens the State Chamber's First Amendment rights however, the statute is justified by a compelling state interest since the State Chamber is much more like a traditional commercial business corporation than a voluntary political association. The State Chamber possesses none of the features which the Court found essential in MCFL, 479 U.S. at 263-264: 1) The State Chamber has economic resources which are unrelated to its political support; 2) It has significant business purposes which create disincentives for its members to disassociate

themselves even if they disagree with its political activities, and; 3) Its members include thousands of traditional business corporations which would permit the State Chamber to act as a conduit for expenditures which would be prohibited if attempted directly. Because unrestricted independent spending by the State Chamber would create a threat to the political marketplace, Michigan may prohibit the State Chamber from making independent political expenditures.

ARGUMENT

I

THE COURT OF APPEALS ERRED IN HOLDING SECTION 54(1) UNCONSTITUTIONAL AS APPLIED TO THE MICHIGAN STATE CHAMBER OF COMMERCE, A NON-PROFIT CORPORATION FORMED TO PROMOTE THE INTERESTS OF THE BUSINESS COMMUNITY, WHICH DRAWS 75 PERCENT OF ITS FUNDS FROM BUSINESS CORPORATIONS.

The teachings of this Court's decisions in Federal Election Commission v. Massachusetts Citizens for Life, Inc., ("MCFL"), 479 U.S. 238 (1986), Federal Election Commission v. National Right to Work Committee, ("NRWC"), 459 U.S. 197 (1982), and previous cases involving restrictions on expenditures and contributions by corporations in candidate elections establish that the statute at issue, MCL § 169.254(1), serves compelling governmental purposes and that it is constitutional as applied to the

Michigan State Chamber of Commerce. The Court of Appeals failed to follow these controlling opinions. Instead, the Court below premised its ultimate holding on a disclosure statute, MCL § 169.251(1), which is not applicable to conduit corporations like the State Chamber. A conduit corporation is a "committee" under the Campaign Act[15] and the disclosure statute relied upon by the Court of Appeals applies only to a "person other than a committee."[16] If the Court of Appeals had followed the precedents of this Court, the result would have been markedly different.

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15 MCL § 169.203(4).

16 MCL § 169.251(1).

A. MCFL Confirms That Restrictions On Corporate Expenditures Are Constitutional As Applied To "Traditional Corporations."

The logic of MCFL and the earlier decisions cited therein compels the conclusion that § 54(1) as applied to traditional business corporations "organized for economic gain," MCFL, 479 U.S. at 259, quoting Federal Election Commission v. National Conservative Political Action Committee, ("NCPAC"), 470 U.S. 480, 500 (1985), is constitutional. Although the Court in MCFL did not address the issue of whether the ban on independent expenditures by profit-making corporations is constitutional, the precedents established by this Court in cases such as Federal Election Commission v. National Right to Work Committee, 459 U.S. 197 (1982),

California Medical Association v. Federal Election Commission, 453 U.S. 182 (1981) and United States v. UAW, 352 U.S. 567 (1957), foreclose any argument that § 54(1)'s prohibition of corporate independent expenditures is unconstitutional as applied to traditional business corporations.

In NRWC, this Court unanimously rejected a challenge to 2 U.S.C. § 441b(b)(4)(C), which places a restriction on the persons who can be solicited by, inter alia, corporate Political Action Committees ("PACs"), but does permit corporations with shareholders or members to solicit those persons for contributions to their PACs. NRWC's political action committee had attempted to solicit persons, other than its members, who had responded to NRWC's mailing indicating support for the organization's policy interests. Because NRWC's political action committee expended corporate treasury funds for that purpose, it violated 2 U.S.C. § 441b. NRWC argued that the people it had solicited should be considered members under the Federal Election Campaign Act and that restricting its PAC's solicitation to only "members" violated the First Amendment. This Court concluded that the persons solicited by NRWC were not its members and upheld the constitutionality of § 441b's ban on such corporate spending.

In reaching this conclusion, the Court observed that, although "[t]he statutory purpose of 441b ... is to pro-

hibit contributions or expenditures by corporations or labor organizations in connection with federal elections," the statute "permits some participation of unions and corporations in the federal electoral process by allowing them to establish and pay the administrative expenses of 'separate segregated fund[s],' which may be 'utilized for political purposes.'" Federal Election Commission v. National Right to Work Committee, 459 U.S. at 201. The Court recognized that this statutory scheme was designed to serve at least two important governmental purposes: "to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to

incur political debts from legislators who are aided by the contributions;" Id. at 207, citing United States v. UAW, 352 U.S. at 567, and "to protect the individuals who have paid money into a corporation [or union] for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." NRWC, 459 U.S. at 208, citing United States v. CIO, 335 U.S. 106, 113 (1948).

Noting that "'[t]he importance of the governmental interest in preventing [the corruption of elected officials] has never been doubted,'" the Court found that these dual purposes were sufficient to overcome the corporation's First Amendment objections to the statute.

NRWC, 459 U.S. at 208, quoting First National Bank of Boston v. Bellotti, 435 U.S. at 765, 788 n. 26 (1978). Finally, the Court concluded that "the statutory prohibitions and exceptions we have considered are sufficiently tailored to these purposes" to avoid unnecessary infringement of First Amendment rights. NRWC, 459 U.S. at 208.

Thus, while acknowledging that "Congress aimed a part of its regulatory scheme at corporations," the Court concluded that "[t]he statute reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation," and refused to "second guess a legislative determination as to the need for prophylactic measures where

corruption is the evil feared." Id. at 209-210.

As discussed in NRWC, Section 441b and its parallel provision, Section 54(1) of the Michigan Campaign Finance Act, serve several purposes which this Court has already found to be compelling. First, it is to ensure that the wealth which corporations are able to accumulate with the aid of special legal protections, intended to serve other purposes, cannot be diverted to the electoral process to incur political debts from candidates for elective office. See, Federal Election Commission v. National Right to Work Committee, 459 U.S. at 207; United States v. UAW, 352 U.S. at 579. Corporations are artificial legal entities endowed by the state with special

advantages, such as limited liability, perpetual life, and special tax treatment in order to facilitate their business objectives. Those special advantages, "so beneficial in the economic sphere, pose special dangers in the political sphere." First National Bank of Boston v. Bellotti, 435 U.S. at 826 (Rehnquist, J., dissenting). This Court has repeatedly recognized the crucial role Section 441b plays in avoiding "the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital." United States v. UAW, 352 U.S. at 585.

As previously explained in NRWC and United States v. UAW, Congress in enacting 2 U.S.C. § 441b and its predecessor laws sought to prevent the diversion of the assets of corporations to the political sphere only after it became aware of widespread abuses which were thought to present imminent danger of corruption of the election process, resulting in a decline of public confidence in the integrity of elected officials and in the fair operation of government. Likewise, the Michigan Legislature in enacting § 54(1) and its predecessor laws had the same concerns. See People v. Gansley, 191 Mich. at 376; 158 N.W. at 201. (J.A. 72a-73a). This Court has repeatedly recognized the elimination of these factors to be a governmental interest of the highest order, so that the careful legislative adjustment of the electoral laws to account for the particular legal and

economic attributes of corporations "warrants considerable deference ... [and] reflects a permissible assessment of the dangers posed by those entities to the electoral process." NRWC, 459 U.S. at 209.

Similarly, in California Medical Association v. Federal Election Commission, 453 U.S. at 195, the Court held that the "important governmental interests in preventing the corruption or appearance of corruption in the political process" justifies limiting the amount that even an unincorporated association may contribute to a multicandidate political committee formed to express the association's political views.

The second purpose behind § 441b and § 54(1) as applied to business cor-

porations is to protect shareholders who have paid money into a corporation "for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." NRWC, 459 U.S. at 208, citing United States v. CIO, 335 U.S. at 113. Congress made clear that "[t]hese funds belong to the stockholders, and the officers have been forbidden by law for years from using the stockholders' funds in an election for these federal offices." 93 Cong. Rec. 7492 (1947).

Prior to the MCFL decision, this Court recognized in NRWC, California Medical Association v. Federal Election Commission, supra, and United States v. UAW, supra, that expenditures by traditional business corporations pose a

threat to the integrity of the electoral process. The thrust of those decisions clearly establish that a ban on corporate independent expenditures as applied to a traditional business corporation is constitutional.

Finally, this conclusion is consistent with the Court's holdings in Federal Election Commission v. National Conservative Political Action Committee, supra, and Buckley v. Valeo, 424 U.S. 1 (1976). In Buckley, the Court struck down a limit on independent expenditures by individuals and political committees. 424 U.S. at 39-51. In NCPAC, while the Court invalidated a limit on independent expenditures by "any committee, association, or organization (whether or not incorporated)," 470 U.S. at 491, the

Court expressly stated "this is not a 'corporations' case." 470 U.S. at 496. In neither case did the Court consider the constitutionality of a ban on independent expenditures as applied to only corporations.

Therefore, based on the interest of government in preventing corruption or the appearance of corruption, business corporations may be limited in the use of funds amassed through favored treatement of the corporate structure, in candidate elections.

B. MCFL Established A Narrow Exemption From The Ban On Corporate Independent Expenditures For Not-For-Profit Corporations.

In MCFL, 479 U.S. 238 (1986), this Court held, over the dissent of four justices, that a parallel provision of

the Federal Election Campaign Act, 2 U.S.C. § 441b,[17] proscribing independent expenditures financed from corporate treasuries, cannot constitutionally be applied to a small, grass-roots group incorporated to advocate a political issue, if it has no financial ties with profit-making businesses and if it derives all of its funds from the voluntary contributions of individuals. In carving out this narrow exception from § 441b for MCFL, the Court reaffirmed its previously expressed rationale of limiting corporate participation in can-

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17 A provision of the Federal Election Campaign Finance Act, 2 U.S.C. § 441b, prohibits "any corporation whatever" from using its corporate treasury funds to make expenditures in connection with a federal election. (J.S. App. 13a, n. 3).

didate elections in order to prevent "the corrosive influence of concentrated corporate wealth," 479 U.S. at 257, that could threaten "the integrity of the marketplace of political ideas," Id., and to prevent corporations "from using an individual's money for purposes that the individual may not support." Id. at 260, citing Federal Election Commission v. National Right to Work Committee, 459 U.S. at 208; Pipefitters v. United States, 407 U.S. 385, 414-415 (1972).

In addition, the Court adopted a third rationale for the limitation on corporate expenditures, namely to prevent organizations that accept contributions from business corporations "from serving as conduits for the type of direct spending that creates a threat to the

political marketplace." Federal Election Commission v. Massachusetts Citizens for Life, Inc., 479 U.S. at 264.

The Court found that these three compelling statutory purposes were not applicable to MCFL, a small, ideological, anti-abortion group, which also happened to be incorporated on a non-profit, non-stock, and non-membership basis, because it was not the type of traditional corporation "that has been the focus of regulation of corporate political activity." Id. at 259. Indeed, grass-roots groups such as MCFL do not pose "the potential for unfair deployment of wealth for political purposes." Id. Thus, this Court concluded that the compelling purposes of Section 441b were inapplicable to MCFL's particular characteristics.

Nevertheless, this Court recognized "the legitimacy of Congress' concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace." Id. at 263.

The Court then carefully articulated the basis for its conclusion that 2 U.S.C. § 441b could not be applied to MCFL's expenditures, noting that the "class of organizations affected by our holding today [may] be small," Id. at 264, and setting out three features of MCFL that were "essential" to its decision:

> ... First, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. ... Second, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. ... Third, MCFL was not established by a business corporation or a labor union,

> and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.
> MCFL, 479 U.S. at 264.

In sum, only organizations possessing all of those three features are affected by the Court's holding in MCFL. 479 U.S. at 264 n. 13. As to the other type of "traditional corporations," this Court acknowledged that the corporate expenditure restriction is necessary in order "to regulate the 'substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization,'" and that "'the special characteristics of the corporate structure require particularly careful regulation.'" MCFL, 479 U.S. at 256, 257, quoting NRWC, 459 U.S. at 207, 209-210.

C. Section 54(1) Is Constitutional As Applied To The State Chamber Because It Does Not Fall Within The MCFL Exemption.

The State Chamber cannot satisfy the three-part test established by this Court in MCFL to exempt itself from the operation of § 54(1) for several reasons. The State Chamber accepts corporate money from its 6,000 corporate members in the form of dues. Thus, in contrast to MCFL, the State Chamber can serve as a "conduit for the type of direct spending that creates a threat to the political marketplace." MCFL, 479 U.S. at 264.

The Court below overrode this careful limitation by treating it as if it read "conduits for massive undisclosed corporate political spending," and by then reading the applicable provisions of the

Campaign Act to require the State Chamber to disclose the sources of its political support. The Court of Appeals conclusion cannot be sustained on either point.

The MCFL limitations do not exclude only undisclosed corporate political contributions: they exclude any corporate money. The great body of federal and state laws regulating political contributions and expenditures and the opinions of this court rest upon the realization that disclosure is not always a sufficient safeguard against the appearance and actuality of corruption resulting from large political contributions and expenditures. "The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives have long been

recognized." (Citation omitted.) Federal Election Commission v. National Right to Work Committee, 459 U.S. at 210.

Judge Merritt, in the dissent from the denial of en banc review, acknowledged that because the State Chamber accepts corporate money from its 6,000 corporate members, it will serve as a conduit "for the type of direct spending that creates a threat to the political marketplace." (Citation omitted.) (J.S. App. 35a). Accordingly, Judge Merritt concluded that the decision below disregarded the third limitation set forth in MCFL:

> The panel decision, therefore, permits the very evil which all members of the Supreme Court agreed a state could prohibit. The panel allows the Chamber to serve as a conduit for the type of direct spending that Michigan legislators believe creates a threat to the political marketplace. (Citation omitted.) (J.S. App. 36a).

Even if the State Chamber reports corporate donations which are intended for election expenditures, it could still act as a conduit for corporate funds. It was MCFL's inability to act as a conduit that this Court found crucial to its conclusion that the statutory purposes of the Federal Election Campaign Act were inapplicable.

Furthermore, the Michigan disclosure statute[18] erroneously cited by the Court of Appeals does not apply to the State Chamber or other incorporated conduits of the funds of business corporations. Thus, if the decision below is followed, the State Chamber and other conduit cor-

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18 MCL § 169.251(1).

porations would be able to accept corporate money in the form of dues from any "member" business corporation and convert such money into political expenditures on behalf of political candidates, without ever disclosing the true source of financing. Voters will, thereby, be denied the true identity of a candidate's constituency and the source of campaign finances. See Buckley v. Valeo, supra, 424 U.S. at 81.

In addition, the record evidence establishes that the State Chamber fails to meet the first and second prongs of the MCFL test. First, the State Chamber, as compared to MCFL, was not formed for the express purpose of promoting political ideas. To the contrary, it was organized primarily for the purpose of

promoting the interests of the business community in Michigan. (J.S. App 3a; J.A. 3a, 42a, 121a-122a, 142a, 147a). The State Chamber engages in a myriad of business and commercial transactions including the publication of newsletters and reports and the presentation of seminars and conventions. (J.A. 40a-42a, 121a-122a, 160a-161a). Second, although the State Chamber has no shareholders, many of its corporate members have shareholders who have an interest in the member corporation's assets or earnings. Such individuals do not necessarily pay money into a corporation to further that entity's political purposes.

The State Chamber clearly fails to meet the three essential criteria set forth by this Court in MCFL. Unlike

MCFL, the State Chamber has features more akin to a business corporation. It was established for the purpose of promoting the interests of the business community in Michigan and engages in a multitude of business activities. It accepts corporate money in the form of dues from its thousands of corporate members. Thus, the State Chamber represents on all fours the type of conduit corporation which this Court excluded from its 5-4 opinion in MCFL. Accordingly, reliance by the Sixth Circuit on the holding in MCFL was erroneous and is grounds for reversal by this Court.

II

THE MICHIGAN CAMPAIGN FINANCE ACT PERMITS THE STATE CHAMBER TO ENGAGE ACTIVELY IN INDEPENDENT POLITICAL SPEECH.

The concerns expressed by this Court in MCFL, that the requirement of a for-

malized organization may deter some ideological groups from engaging in political expression and that statutory limitations on political action committee solicitation may result in less money being available for independent expenditures than if general treasury funds could be used, are not applicable to the State Chamber. MCFL, 479 U.S. at 254-255. The evidence clearly establishes that § 54(1) does not impermissibly restrict the amount, content or methods of the State Chamber's protected speech.

The State Chamber was formed in 1959, over thirty years ago. (J.A. 124a). It represents the interests of over 8,000 Michigan corporations and businesses "engaged in civic, professional, commer-

cial, industrial, agricultural and recreational enterprises." (J.A. 3a). More than 75% of the members of the State Chamber are corporations. (J.A. 134a). The majority of its corporate members are profit-making corporations. (J.A. 134a). The State Chamber is primarily funded by the annual dues paid by its members. (J.S. App. 2a-3a). Thus, in contrast to MCFL, the State Chamber has a substantial membership base and has a steady and reliable source of financial resources. Cf., MCFL, 479 U.S. at 242.

Moreover, the record evidence establishes that the State Chamber has been able to be actively involved in the political process and is very much involved in electoral politics in Michigan. For example, the State Chamber

has, inter alia, expended its treasury funds for the purpose of: establishing, administering and soliciting contributions to its highly successful political action committee; lobbying members of the legislative and executive branches of state government; contributing to ballot question committees; donating to an elected official's officeholder expense fund; communicating its views through advertisements to the electorate on legislative and public policy issues; funding a reapportionment lawsuit; and communicating its views on political issues to executive and administrative personnel of member corporations. (J.A. 138a, 144a-147a, 163a-168a). In addition, provisions of the Campaign Act permit the State Chamber to expend its treasury funds for the purpose of con-

ducting nonpartisan registration and get-out-the-vote campaigns and contributing to political party organizational activities. MCL § 169.206.

The record evidence also establishes that the State Chamber Political Action Committee established by the State Chamber is efficiently run, well-financed and highly successful. The State Chamber Political Action Committee was established in 1977 and has made political expenditures in every election since it was established. (J.A. 136a, 148a). The State Chamber PAC has been an exceedingly effective mechanism in generating political support for political candidates responsive and congenial to its point of view. For example, in the November, 1980 general election, 63

out of 66 State Chamber PAC-endorsed candidates for the Michigan House of Representatives were successful. (J.A. 162a). In two special elections conducted in the Spring 1984, the two State Chamber PAC-endorsed candidates for the Michigan State Senate were successful. (J.A. 162a). In the November, 1984 general election, 64 out of the 67 State Chamber PAC-endorsed candidates for the Michigan House of Representatives were successful. (J.A. 162a). The State Chamber PAC was the largest contributor in almost every candidate race in which it participated in the 1983-1984 election cycle. (J.A. 162a).

The State Chamber has successfully encouraged and assisted corporations, trade and professional associations, and

local chambers of commerce in forming political action committees. (J.A. 157a). Pursuant to these efforts by the State Chamber, the number of business and professional political action committees in Michigan has grown from 30 in 1976 to over 200 in 1986. (J.A. 157a-158a). The State Chamber set a fundraising record in the 1983-1984 election cycle, soliciting contributions in the amount of $102,000.00 for the State Chamber PAC. (J.A. 162a). For the 1985-1986 election cycle, the State Chamber expected to raise over $140,000.00 in voluntary contributions for the State Chamber PAC. (J.A. 143a). Through the efforts of the State Chamber, Michigan has the largest number of chamber political action committees in the country. (J.A. 169a).

Finally, the record evidence refutes the concern set forth by this Court in MCFL that the administrative and financial burdens of establishing and maintaining a PAC in order to finance election expenditures are substantial enough to discourage some small, informal organizations like MCFL from engaging in political speech. MCFL, 479 U.S. at 254-255. Here, the evidence shows that the costs of establishing the State Chamber PAC were minimal and that the costs of maintaining the State Chamber PAC are so insignificant that the State Chamber does not even maintain such financial information. (J.A. 138a-140a). Further, the State Chamber regularly and successfully distributes "how-to-do-it" kits to its corporate members, who, because of the efforts of the State

Chamber, have seen in the last few years an increase of over 600% in the number of PACs sponsored by Michigan corporations. (J.A. 156a-162a).

The ability of the State Chamber to engage in political speech has not been burdened or inhibited by the disclosure, organizational and solicitation restrictions of the Michigan Campaign Finance Act. As compared to the MCFL, the State Chamber had already successfully established a separate segregated fund shortly after the enactment of the Michigan Campaign Finance Act in December, 1976. Cf., MCFL, 479 U.S. at 255 n. 8. In contrast to the MCFL, the State Chamber failed to produce any record evidence that the organizational requirements of the Michigan Campaign

Finance Act adversely affects its ability to finance its affluent PAC. Cf., MCFL, 479 U.S. at 226 (O'Connor, J., concurring). Accordingly, there is no basis to conclude that § 54(1) impermissibly burdens the First Amendment rights of the State Chamber.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals that MCL § 169.254(1) is unconstitutional as applied to the Michigan State Chamber of Commerce should be reversed.

Respectfully submitted,

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